In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 175

BEN FRIEDMAN,
Petitioner,
vs.
HEATING EQUIPMENT MANUFACTURING CO.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of the State of Ohio.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The verdict of the jury in favor of the Respondent below, on which the judgment in the Court of Common Pleas was based is set forth at length in the record (R. 16-17). The findings of the Court of Common Pleas on the Petitioner's motion for new trial was also set forth in the record at length (R. 20-21). The judgment of the Court of Common

Pleas was affirmed without written opinion by the Court of Appeals, Eighth District, on November 7, 1951 (R. 174). The order of the Supreme Court of the State of Ohio, denying the Petitioner's Motion to Certify the record is set forth in the record at length (R. 176).

JURISDICTION.

1. Petitioner bases his Petition for a Writ of Certiorari on the judgment of the Court of Appeals for the Eighth District of Ohio, which was entered on November 7, 1951 (R. 174), citing the denial by the Supreme Court of the State of Ohio on February 6, 1952, of Petitioner's Motion to Certify the Record (R. 176) for his position that the judgment of the Court of Appeals was rendered in the highest court of the State in which a decision could be had.

2. The jurisdiction of this Court is invoked by the petitioner under 28 U.S.C. Sec. 1257 (3).

3. The section of the Constitution of the United States on which petitioner relies is Amendment XIV, and that clause thereof which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

The questions presented by petitioner's application for a writ of certiorari are as follows:

1. Is any Federal Question presented by the petitioner for a writ of certiorari to a state court in a cause involving only the construction and application of the Ohio Sales Act by the Ohio Courts?

2. Has Petitioner complied with the rules of this Court and in particular Rule 38 and Rule 12 thereof, relating to the form of jurisdictional statements required in appeals and Petitions for Writs of Certiorari to a state court, and in particular the following requirements thereof:

   (1) The statement specifying the stage in the proceedings in the court of first instance, and in the appellate court at which and the manner in which the Federal Questions sought to be reviewed were raised?

   (2) The method of raising such Federal Questions and the manner in which they were passed upon by the Court with pertinent quotations of specific portions of the record, or summary thereof, and specific references to the places in the record where the matters appear which will support the assertion that the rulings of the Court were of a nature to confer jurisdiction upon this Court?

3. Is Petitioner deprived of due process of law or equal protection of the laws within the meaning of the Fourteenth Amendment of the Constitution

of the United States by the action of a state appellate court in affirming a decision of a state trial court on a question of state law based upon findings of fact by a properly constituted state jury on the basis of evidence which the state courts held to be conflicting but substantially in Respondent's favor?

4. Does the due process clause of the Federal Constitution entitle a party to a civil action to review in the Supreme Court of the United States from an adverse ruling of a state court on a question of state law?

STATUTES INVOLVED.

In addition to the Due Process and Equal Protection clauses of the Constitution of the United States upon which Petitioner relies, the following sections of the General Code of the State of Ohio are also involved:

Ohio General Code, Section 8424 (3):

> "When the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

Section 8428:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation

to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Section 8430:

"Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he notified the seller that he refuses to accept them."

Section 8449:

"Section 8449, Breach of Warranty. (1) When there is a breach of warranty by the seller, the buyer may, at his election—

(b) Accept or keep the goods and maintain action against the seller for the damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods already have been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. . . .

(3) When the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if

he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if the deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the Buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) When the Buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) When the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods, as bailee for the seller, but the subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcements of such lien allowed to an unpaid seller by section eighty-four hundred and thirty-three."

The petitioner has also cited Ohio General Code Sections 8429 and 8449(7) upon collateral points.

STATEMENT OF FACTS.

As the facts in this matter were found generally in the Respondent's favor by the jury in the trial of this action in the Court of Common Pleas (R. 16-17) and such findings were adopted by the Trial Judge on the Petitioner's motion for a new trial (R. 20-21), the facts as so found by the jury and the Trial Judge must be accepted as conclusive in this matter.

The facts as so found (R. 20-21) are simple and do not require extensive restatement here. Respondent is a California corporation which ordered steel from the Petitioner from his principal office in Cleveland, Ohio. According to the Respondent's testimony, which the jury evidently accepted, the order was for steel of a certain gauge, and the Petitioner did not ship to the Respondent all of the goods of such specifications that the Respondent ordered, but shipped steel of other gauges not conforming to Respondent's purchase order. Respondent commenced this action in the Ohio courts for damages for breach of warranty.

The Court and jury found that the Respondent accepted the goods which complied with the specifications of his purchase order and notified the Petitioner that he would warehouse the non-complying goods, subject to Petitioner's order, and demanded reimbursement for the non-conforming goods.

The Petitioner thereupon personally travelled to San Francisco and later sent an agent to San Francisco. The Court and jury found that Petitioner took possession of these goods and fixed a price at which they were to be sold. The Court and jury further

found, at the time when Petitioner took possession of these goods, they were as a matter of law returned by the Respondent to the Petitioner. (R. 20-21.)

Some claim is made by Petitioner that a letter signed by his agent and delivered to Respondent constituted a modification of the prior sales contract, but the Court and jury obviously did not accept this claim (R. 154, 156).

ARGUMENT.

1. THE QUESTIONS PRESENTED BY THIS PETITION FOR WRIT OF CERTIORARI ARE ENTIRELY MATTERS OF STATE LAW, AND POSE NO FEDERAL QUESTIONS JUDICIALLY COGNIZABLE BY THIS COURT UNDER THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION.

It is Hornbook teaching that the Supreme Court of the United States exercises appellate jurisdiction over decisions of state courts only when real and substantial Federal Questions are drawn in controversy in the state courts, and are actually and necessarily decided by the state court adversely to the appellant's or petitioner's claim of Federal rights. Such Federal Questions may involve either the Federal Constitution or a Federal statute or treaty, but it is equally elementary that the construction of a state constitution or a state statute, an interpretation of the state's common law, are matters beyond the appellate jurisdiction of the Supreme Court of the United States.

In the leading case of *Murdock v. Mayor of Memphis,* 20 Wall. 590, 22 L. Ed. 429 (U. S. 1875), this Court passed upon a claim similar to the petitioner's

apparent attempt to invoke the jurisdiction of the Supreme Court of the United States to review matters of State law. This Court disposed of the claim in an historic decision which remains to this day as the classic and definitive statement of this Court's jurisdiction over decisions of state courts, whether such decisions arise by appeal or by writ of certiorari. The Court said there, through Mr. Justice Miller:

> "The proposition is that by a fair construction of the Act of 1867 this Court must, when it obtains jurisdiction of a case decided in a State Court, by reason of one of the questions which the case presents which may be found necessary to a final judgment on the whole merits. To this has been added a further suggestion that in determining whether the question on which the jurisdiction of this Court depends, has been raised in any given case, we are not limited to the record which comes to us from the State Court—the record proper of the case as understood at common law—but we may resort to any such means of ascertaining what was really done in the State Court as this Court may think proper, even to *ex parte* affidavits. . . ."

> "Is it consistent with this extreme caution to suppose that Congress intended, when these cases came here, that this Court should not only examine those questions, but all others found in the record—questions of common law, of state statutes, of controverted facts, and conflicting evidence? Or is it the more reasonable inference that Congress intended that the case should be brought here that those questions might be decided and finally decided by the Court established by the Constitution of the Union, and the Court

which has always been supposed to be not only the most appropriate but the only proper tribunal for their final decision? . . . The State Courts are the appropriate tribunals, as this Court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly. . . ."

"We are of the opinion that upon a fair construction of the whole language of the section the jurisdiction conferred is limited to the decisions of the questions mentioned in the statute, and, as a necessary consequence of this, to the exercise of such powers as may be necessary to cause the judgment in that decision to be respected."

Even in the period before the decision by this Court in *Erie Railroad Co. v. Tomkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) when, under the doctrine of *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865, it was supposed that there existed a Federal common law applying to commercial transactions in diversity of citizenship cases, it was never supposed that the so-called Federal common law applied where state *statutory* law existed. And of course, since the decision in *Erie v. Tomkins,* it has been clear that there is no Federal common law in commercial transactions, regardless of the presence or absence of state statutory law.

The Court there held:

"Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the

> law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Indeed, the proposition is so well established in federal law that the Supreme Court has no jurisdiction to correct even erroneous decisions of a state court on the interpretation of state law, that the petitioner's attempt at this time to invoke the jurisdiction of this court can only be characterized as "sham and frivolous". For it is equally well decided that the federal question involved must be a real and substantial federal question, and not merely a sham or unsubstantial federal claim.

Wabash Railway Co. v. Flannigan, 192 U.S. 29, 38, 24 S. Ct. 224, 48 L. Ed. 328 ("manifestly lacking all color of merit"); *Seaboard Air Line Ry. v. Padgett,* 236 U. S. 668, 671, 36 S. Ct. 481, 59 L. Ed. 777 ("so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous"); *Erie Railroad Co. v. Solomon,* 237 U. S. 427, 430-31, 35 S. Ct. 648, 59 L. Ed. 1033; *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.,* 228 U. S. 596, 599-600, 33 S. Ct. 605, 57 L. Ed. 982 ("utterly without merit"); *Stewart v.*

Kansas City, 239 U. S. 14, 16, 36 S. Ct. 15, 60 L. Ed. 120 ("more formal than substantial").

It will be Respondent's position in this brief that the Petitioner's application for a Writ of Certiorari is sham and frivolous, and is interposed in this matter solely for purposes of delay. Upon this basis, Respondent is concurrently submitting to this Court a motion for the assessment of penalties against the Petitioner for filing a frivolous Petition for Writ of Certiorari.

We shall now proceed to demonstrate why in our opinion petitioner's attempt to show a properly presently Federal Question is devoid of all merit.

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2. NO CLAIM OF ANY FEDERAL CONSTITUTIONAL RIGHT WAS EVER MADE OR SPECIFICALLY SET UP BY PETITIONER AT ANY TIME IN THE TRIAL OR APPEAL OF THIS CAUSE IN THE OHIO COURTS.

Petitioner asserts the claimed constitutional question for the first time in this Court.

The decisions of this Court are absolutely clear that a party seeking to avail himself of a personal right or privilege under the Constitution of the United States must raise his constitutional claim at the first appropriate time under the procedure of the state from which the case arises.

In *Hartfield Life Ins. Co. v. Johnson,* 249 U.S. 490, 433, 39 S. Ct. 336, 63 L. Ed. 722, this Court indicated that the Federal Question must be asserted in the state courts:

> ". . . at the proper time and in the proper manner by pleading, motion or other appropriate action, under the state system of pleading and practice. . . ."

Rule 12 of the Rules of this Court establishes the same requirement and additionally requires that a Petitioner for a Writ of Certiorari affirmatively show in his petition when, where, and in what manner the asserted Federal Question was raised in the state courts. Paragraph 1 of Rule 12 of this Court provides as follows:

> "If an appeal is from a state court, the statements shall in addition specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. *The provision of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari.*" (See Rule 38, par. 2.)

The record in this case is absolutely devoid of any reference to the raising of a Federal Question in the Ohio State courts. Indeed, the entire trial and appeal of this cause has turned upon the construction and interpretation of the Ohio Sales Act, purely a matter of state law in an area where the decisions of the State courts are conclusive upon this Court. The petitioner has been unable to point to a single reference in the transcript of record in this matter where a Federal Constitutional question was raised either in the trial of this action or on its appeal in the Ohio State Courts.

The decisions of this Court are clear that the Federal Question may not be raised for the first time in the petition for a writ of certiorari. See *Hiawassee River Power Co. v. Carolina- Tennessee Power Co.*, 252 U. S. 341, 344, 40 S. Ct. 330, 64 L. Ed. 601; *White River Lumber Co. v. Harrison ex. Rel. Applegate*, 279 U. S. 692, 700, 49 S. Ct. 457, 73 L. Ed. 903.

It is equally well decided that federal questions raised in briefs in the state court form no part of the state court record, for the purposes of Supreme Court review, and cannot be relied upon to establish that a federal question was raised. See *Live Oak Water Users' Assn. v. Railroad Commission of California*, 269 U. S. 354, 357-58, 46 S. Ct. 149, 70 L. Ed. 305. *A fortiori*, raising a federal question in oral argument before the state court is unavailing as such oral argument is not a part of the state court record.

3. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN THE OHIO STATE COURTS.

It is now well established that the due process of law required by the Fourteenth Amendment to the Constitution of the United States has both procedural and substantive connotations. It is not clear from the Petition for Certiorari in this action whether Petitioner relies on a procedural deficiency in the trial of this action or whether he relies solely on the matter of the substantive law applied by the Ohio courts, or whether he simply seeks a third opportunity to appeal an adverse decision after having failed in two prior attempts to reverse the judgment of the trial court.

Whatever petitioner's position may be, it is clear that due process of law does not require even a single appeal, and therefore it clearly does not entitle petitioner to a third appeal to this Court.

The Court said, in *Reetz v. Michigan*, 188 U. S. 505, 507, 508, 23 S. Ct. 390, 47 L. Ed. 563 (1903):

> "It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision. . . . We know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court of a board of registration, the final determination of legal questions. . . . Neither is the right of appeal essential to due process of law."

The meaning of the due process of law which a state is compelled by the Federal Constitution to afford a litigant in a civil suit is indicated in *Brinker-*

hoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 551, 74 L. Ed. 1107 (1930):

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

The *Brinkerhoff* case makes clear that the Supreme Court cannot decide what the state law is, but can only require that the state courts, in applying their self-determined substantive and adjective law, the "due process" which that law provides.

The "due process" to which petitioner is entitled, however, is only an opportunity to have his position heard in a properly constituted state tribunal having jurisdiction over the parties and the subject matter. It does not entitle him to a correct decision under state law, because the correction of errors of state law is left exclusively to the state courts. The requirements of "due process" were aptly stated by Mr. Justice Brandeis, in his concurring opinion in *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 76, 56 S. Ct. 720, 80 L. Ed. 1033 (1936), as follows:

"To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. . . . They tell us that due process is not necessarily judicial process. . . . And they draw distinctions which give clear indication when due process requires judicial process and when it does not.

"The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the Government . . .) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights. . . . A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. . . . But a multitude of decisions tells us that when dealing with property a much more liberal rule applies."

Petitioner's arguments that when a case is decided by a state court in violation of settled principles of law, and contrary to undisputed facts, due process of law and equal protection of the laws are denied to

the parties. (*Petition for Certiorari,* p. 12.) At the risk of repetition, Respondent again points out that the settled principles of law we are discussing are principles of *state law* with which this Court has no concern. Indeed, the *Brinkerhoff* case recognizes that a state court may, if it chooses, overrule a prior decision, and the party adversely affected thereby, even though he may have relied on the prior decision, cannot complain of a deprivation of due process. The Ohio Courts in this respect are as free to change their law of sales contracts as the Ohio legislature, subject only to their own rules of *stare decisis.*

With respect to Petitioner's claim that the facts in this matter were undisputed, it is difficult to find the basis for such argument in the record in this case. Indeed, a fair reading of the record shows that the facts were warmly disputed by both Petitioner and Respondent.

It is too elementary to require further citation in answer to Petitioner's argument (Petition for Certiorari, p. 8) that the measure of recovery in this matter was erroneous. It is clear that the matter of pleading and proof of damages and the manner in which a rescission may be effected are solely questions of Ohio law, and in this respect the Ohio courts are no more bound by the authorities cited by Petitioner in his brief than they would be bound by the precedents of sister states.

All of the elements of due process have been afforded Petitioner in this case. He was afforded the

opportunity of a hearing in a trial before a properly constituted Ohio Court, and a proper impanelled Ohio jury. No question was raised then, or is raised now, concerning the jurisdiction of the Ohio Court over the subject matter or the parties to the action. Petitioner received notice of the hearing and an opportunity to be heard. Indeed, his arguments have been heard and passed upon by not only one but three Ohio Courts. This is more than due process requires. Certainly due process does not require this Court to become a super court of review over all decisions of state law which one of the litigants may be dissatisfied or believe erroneous.

CONCLUSION.

Respondent reiterates its position that this Petition for Writ of Certiorari is sham and frivolous, and that this presents a proper instance for the Court to assess penalties. Only in this manner can the Court escape the burden of innumerable petitions for certiorari posed by vengeful or litigious parties without hope of success and solely for purposes of delay. Only through the occasional assertion of this Court's discretionary power to assess penalties for the filing of such sham or frivolous applications can the number of petitions be controlled. For these reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied and Petitioner should be assessed for penalties for the filing of a

frivolous petition, as provided in Rule 30 of the Rules of this Court, and Sections 1912 and 2103, Title 28, U.S.C.

Dated, San Francisco, California,
August 29, 1952.

Respectfully submitted,
SAUL PERLIS,
Counsel for Respondent.

ROBERT E. ZANG,
SEVERSON & MCCALLUM,
Of Counsel.

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HEATING EQUIPMENT MANUFACTURING CO.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of the State of Ohio.

MOTION FOR DAMAGES FOR DELAY.

Respondent, Heating Equipment Manufacturing Co., shows that the federal questions presented as a basis for the Petition for Writ of Certiorari in this case are unsubstantial, and have been previously foreclosed by opinions of this Court.

Respondent therefor moves the court, upon denial of said Petition, to allow damages and penalty to Respondent in accordance with the provisions of sub-

division 2, Rule 30, of the Revised Rules of this Court, and Sections 1912 and 2103, Title 28, U. S. C.

Dated, San Francisco, California,
August 29, 1952.

SAUL PERLIS,
SEVERSON & MCCALLUM,
Counsel for Respondent.